STATE OF MICHIGAN

COURT OF APPEALS

THOMAS HUTT and SHANNON HUTT,

Plaintiffs-Appellants,

v

JOHN REICHENBACH,

Defendant-Appellee.

UNPUBLISHED
January 20, 2005

No. 250762
Oakland Circuit Court
LC No. 2001-036791-CH

Before: Smolenski, P.J., and Saad and Bandstra, JJ.

PER CURIAM.

In this action to quiet title, plaintiffs appeal as of right from the trial court's grant of summary disposition in favor defendant. We affirm in part, reverse in part, and remand.

Plaintiffs brought suit against defendant, an adjoining landowner, claiming that a privacy fence defendant had erected encroached onto their property. Specifically, plaintiffs alleged that a wedge shaped parcel of property on which the fence was erected was actually part of plaintiffs' lot. Plaintiffs claimed the area in dispute belonged to them either as record titleholders or by acquiescence. The trial court dismissed plaintiffs' claim premised on record ownership under MCR 2.116(C)(10), and dismissed plaintiffs' claim based on acquiescence under MCR 2.116(C)(8). On appeal, plaintiffs only pursue the dismissal of their acquiescence claim.

In lieu of providing a metes and bounds description of the disputed area in their complaint, plaintiffs attached to the complaint a survey showing a number of lots in their subdivision, and indicated that the area in dispute was "described and reflected by the bolded lot lines" on the attached survey. The bolded lot lines on the survey simply outlined a continuous parcel consisting of plaintiffs' lot of record and the area in dispute. Among numerous other landmarks and monuments noted on the survey was a stone wall corresponding to plaintiffs' southeastern boundary. The wall includes a corner pillar located southwest of the lot line.

Plaintiffs argue that the trial court erred in granting summary disposition to defendant under MCR 2.116(C)(8). We disagree. We review de novo a trial court's grant of summary disposition based upon a failure to state a claim. *Adair v State*, 470 Mich 105, 119; 680 NW2d 386 (2004). "'A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant.'" *Id.*, quoting *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A mere statement of conclusions unsupported by allegations of fact will not suffice to state a

cause of action. *Churella v Pioneer State Mut Ins Co*, 258 Mich App 260, 272; 671 NW2d 125 (2003).

We conclude that the trial court properly dismissed plaintiffs' acquiescence claim. A claim of acquiescence for the statutory period requires a showing that the parties acquiesced in the line and treated it as the boundary for fifteen years. *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000). Here, plaintiffs do not allege any factual basis in support of their acquiescence theory. Rather, they merely allege in a conclusory manner that they own the land in dispute. Plaintiffs make no reference at all to the stone wall or pillar in their complaint, let alone allege that those monuments form a boundary line that all parties have acquiesced to for the requisite fifteen years.

Plaintiffs argue that a sufficient factual basis exists in that these stone monuments are noted on the survey, which was incorporated by reference into the complaint. While it is true that the monuments appear on the face of the survey, so do numerous other monuments, lot lines, survey stakes, and other markings. In fact, the face of the survey gives no indication that the parties have accepted the stone wall and pillar as monuments marking the property line.

In essence, plaintiffs have stated the elements of an acquiescence claim in their complaint without offering any factual support for how those elements are satisfied. The mere recitation of their legal conclusions, unsupported by allegations of fact, does not suffice to state a cause of action. *Churella, supra* at 272. Therefore, because a (C)(8) motion requires the trial court to accept as true and construe in a light most favorable to the nonmovant only the "well-pleaded factual allegations" in the complaint, *Adair, supra* at 119, we conclude that the trial court did not err in granting summary disposition to defendant regarding this claim.

However, we agree with plaintiffs that the trial court abused its discretion in refusing to allow them to amend their complaint.[1] See *Ormbsy v Capital Welding, Inc*, 471 Mich 45, 53; 684 NW2d 320 (2004). If a court grants summary disposition pursuant to MCR 2.116(C)(8), the trial court must ordinarily give the parties an opportunity to amend their pleadings pursuant to MCR 2.118. MCR 2.116(I)(5); *Weymers v Khera*, 454 Mich 639, 658; 563 NW2d 647 (1997). A motion to amend should be denied only for the following reasons: "'[1] undue delay, [2] bad faith or dilatory motive on the part of the movant, [3] repeated failure to cure deficiencies by amendments previously allowed, [4] undue prejudice to the opposing party by virtue of allowance of the amendment, [and 5] futility . . . .'" *Weymers, supra* at 658-659, quoting *Ben P*

[1] Defendant argues that plaintiffs failed to preserve this issue because they did not specifically file a motion for leave to amend. However, plaintiffs sought leave to amend in their motion for relief from judgment and argued at the corresponding hearing that they should be granted leave to amend. While the court did not specifically address the amendment issue from the bench, it implicitly denied plaintiffs' request when it denied their motion for relief from judgment. In any event, appellate consideration of an issue raised before the trial court but not specifically decided by the trial court is not precluded. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994).

Fyke & Sons v Gunter Co, 390 Mich 649, 656; 213 NW2d 134 (1973) (brackets and ordinals added by the *Weymers* Court).

In support of its denial of plaintiffs' request to amend, the trial court cited what it characterized as an "extraordinarily late attempt to introduce new facts, following the close of Discovery and Case Evaluation, near the eve of trial." With respect to arguing delay as a ground for denial of a motion to amend, *Weymers* provides the following guidance:

> Delay, alone, does not warrant denial of a motion to amend. However, a court may deny a motion to amend if the delay was in bad faith or if the opposing party suffered actual prejudice as a result. "Prejudice" in this context does not mean that the allowance of the proffered amendment may cause the opposing party to ultimately lose on the merits. Rather, "prejudice" exists if the amendment would prevent the opposing party from receiving a fair trial, if for example, the opposing party would not be able to properly contest the matter raised in the amendment because important witnesses have died or necessary evidence has been destroyed or lost. [*Weymers, supra* at 659 (citations omitted).]

We conclude that defendant would not have been prejudiced had the court permitted plaintiffs to amend their complaint. There is no indication in the record that any witnesses have died, any evidence has been destroyed, or that an amendment would otherwise deny defendant a fair trial. *Id.* Further, we note that a trial court has the authority to "order the amending party to compensate the opposing party for the additional expense caused by the late amendment, including reasonable attorney fees." *Id*. at 658. Accordingly, we conclude that the trial court abused its discretion in denying plaintiffs leave to amend. *Ormbsy*, *supra* at 53.

Finally, because we have concluded that the trial court erred in not granting plaintiffs leave to amend their complaint, we need not address plaintiffs' assertion that the trial court erred in denying their motion for relief from judgment.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael R. Smolenski
/s/ Henry William Saad
/s/ Richard A. Bandstra